UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DOE, Plaintiff v. TRUSTEES OF BOSTON COLLEGE, Defendant	Civil Action No: 1:19-cv-11626-DPW ***SEALED***

DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendant Trustees of Boston College ("BC") submits this Supplemental Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction. BC submits this brief to: (1) address the First Circuit's recent decision in *Haidak v. Univ. of Massachusetts-Amherst*, No. 18-1248, 2019 WL 3561802 (1st Cir. Aug. 6, 2019); (2) provide the Court with additional facts contained in the Declaration of Corey Kelly, attached hereto as Exhibit A; and (3) address new facts and arguments raised in Plaintiff's Reply Brief.

ARGUMENT

I. DOE IS NOT LIKELY TO SUCCEED ON HIS CONTRACT CLAIM.

Doe's breach of contract claim is unlikely to succeed on the merits in light of the Court's recent decision in *Haidak*.

A. Doe Had No Right to Cross-Examination.

In *Haidak*, the First Circuit declined to adopt the Sixth Circuit's holding in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), which requires that public universities permit a student accused of misconduct or the student's representative to directly cross-examine the complainant if the case turns on credibility determinations. *Haidak*, 2019 WL 3561802 at *9. The Court in *Haidak*

reiterated the well-established view that student disciplinary proceedings need not be conducted like common law trials and noted that there is no reason to believe that questioning of a complainant or other witness cannot adequately be performed by a neutral party. *Id.* The fact-finding Board in *Haidak* questioned both the complainant and the respondent, at length, three times, in an "iterative process" and probed them for details; the Court found that this "inquisitorial" process was "reasonably calculated to get to the truth by allowing [the respondent] to be heard after [the complainant] testified and by examining [the complainant] in a manner reasonably calculated to expose any relevant flaws in her claims." *Id.* at *10-11. If cross-examination by a party is not required for "Constitutional fairness" – which applied to the public university in *Haidak* – it certainly is not required for "basic fairness" as a matter of contract law at private institutions like BC.

Moreover, the fact-finders in this case in fact used an iterative process of questioning entirely analogous to the hearing process in *Haidak* in an effort "calculated to expose any relevant flaws" in the complainant's claim. The investigators detailed report shows that they first questioned Roe for several hours, before questioning Doe for several hours. The investigators then questioned both Roe and Doe a second time, before interviewing Roe a third time. *See* Rpt. at 4-5. Through this process, the investigators had ample opportunity to understand Doe's competing account of the events at issue, and to question Roe accordingly. Following this series of interviews, Doe was afforded the opportunity to read summaries of Roe's testimony and provide extensive comments on the testimony and evidence that the investigators gathered. Unlike the formal hearing process in *Haidak,* which required the respondent to respond in real time to the evidence presented against him, BC's investigative process afforded Doe several days in which to consult with his attorneys, formulate his response,

and provide additional information to the fact-finders. It is beyond dispute that Doe "had an opportunity to answer, explain, and defend" that was at least equivalent to, if not greater than, the process that was upheld in *Haidak*. *Id.* at * 7 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988)).[1]

B. The Investigator Model is Fair.

In *Haidak*, the Court upheld a university's "inquisitorial system" of adjudicating student conduct cases, in which the university was responsible for investigating the facts in a non-adversarial way. *Id.* at *8. BC's investigative model takes just such an approach, and in a manner more favorable to the respondent than the live hearing process in *Haidak*. BC's investigators interviewed Roe three times, during which the investigators probed her account of the incident in detail. The thoroughness with which the investigators probed Roe's account, and weighed it against Doe's competing version, is documented in the investigators' report. The Investigators challenged and probed Roe several times with statements and arguments Doe had made. *See, e.g.*, Rpt. at pp. 33, 34, 53.

It makes no difference that Doe's proceeding was before a pair of investigators as opposed to a hearing board. All the same elements that the court endorsed in *Haidak* are present in BC's investigator model, including: notice of the charge(s), an opportunity to present evidence, an opportunity to respond to – and present comments to challenge – the evidence offered by the other party, and so on. The fact that a university chooses to conduct this "inquisitorial process" using investigators, rather than a live hearing, in no way prejudices the

[1] Doe argues in his reply memorandum that he did not have sufficient notice of the allegation that Smith did not consent. Reply at 3-4. Not only was Doe informed of the specific code violation and the definition of consent, the investigation report shows that Doe was on notice that he should provide evidence of consent. Doe was asked by the investigators to identify the reasons why he believed Roe consented to sex; and he gave six specific reasons, which the investigators then probed and discussed in detail with him and Roe. *See* Rpt. at pp. 59-60.

respondent. In fact, as noted above, the investigative model affords the respondent far greater opportunities to review the evidence against him, consult with counsel, and provide additional evidence and argument to the fact-finders.

C. Doe's Allegations of Inadequate Questioning Are Misleading.

In his reply memorandum, Doe argues that the investigators did not question Roe on her "allegations of non-consent in light of the undisputed evidence." Reply at 6. Doe claims there was "undisputed" evidence of consent – i.e., that Roe consented to removal of her shorts; said "I know you want to do it;" held her underwear to the side and told Doe to "Do it;" gave verbal instructions during penetration such as "go slow" and "hold it there;" and agreed to switch positions then turned on her stomach. *Id.* at 6, 7, 8. These facts were not all "undisputed," however, and the investigators' report clearly shows that the investigators probed these allegations with Roe and considered them carefully in reaching their decision that, based upon a preponderance of the evidence, Roe consented to certain sexual activity but not *sexual penetration.*

Regarding the removal of Roe's shorts, the investigators questioned Roe closely about the fact that she agreed to take off her shorts, which Roe never disputed. *See* Rpt. at 46 (Roe "told her suitemates that she allowed [Doe] to take her shorts off, but recalled telling him that he could not take her underwear off"); *id.* at p. 59 ("The Investigators also credited [Doe's] statement that she was "flirtatious" with him, told him that she knew that he "want[ed] to do it," and helped him remove her shorts by arching her back. [Roe] did not dispute this, and stated that she had some memory of kissing [Doe] and allowing him to remove her shorts."). The investigators reasonably concluded that this was evidence of Roe's consent to "make out" in the initial stages of the encounter, but not for sexual penetration of her vagina. *Id.* at 59-60.

Doe told the investigators that while he and Roe were kissing, Roe asked him to kiss her neck, which he did, at which point Roe said, "I know you want to do it." Rpt. at 38. The Investigators questioned Roe about this, too. She recalled Doe telling her, in their [redacted] conversation about the encounter, that she told him to kiss her neck, and said, "I know you want to do it," but Roe had no memory of saying these things and told him that. *Id.* at 52. Moreover, Doe essentially argued that Roe telling Doe to kiss her neck and saying "I know you want to do it" in the context of neck-kissing – which she did not recall – amounted to consent to have sex. *Id.* at 60. The investigators reasonably concluded that this initial flirtatious statement was evidence of Roe's consent to "make out" in the initial stages of the encounter, but not for sexual penetration of her vagina. *Id.* at 59-60.

Regarding the condom, the investigators also questioned Roe at length and confronted her with Doe's claim that she asked Doe to get one. *See* Rpt. at 33. Roe said that she had "a vague memory of some conversation about condoms," but that she had no recollection of asking Doe to get one or wear one. *Id.* She also said that when Doe and Roe later talked about the encounter on [redacted], she asked Doe whether she had either "instructed" or "ordered" him to "put a condom on," and he replied that she had not. *Id.* The investigators found that "whatever conversation the parties had about a condom was not sufficient to counter the fact that Roe expressed a lack of consent to Doe for penetration of her vagina by telling him not to remove her underwear." *Id.* at 60.

The investigators also questioned Roe about Doe's claim that she pulled her underwear to the side and said "Do it." *Id.* at 34. Roe said she had no memory of saying this and did not believe that it happened because Doe did not say either of these things had occurred during their [redacted] conversation. *Id.* at 34-35. Moreover, the investigators did not credit Doe's account

of the "Do it" comment because he did not provide this information in his first interview; instead, when asked if Roe instructed him to penetrate her vagina, he said that he did not recall her having done so, and did not recall having "any conversation" with Roe immediately prior to penetrating her vagina. *Id.* at n.74. The investigators also found it implausible that Doe would have neglected to mention the alleged "Do it" comment during his [redacted] conversation with Roe. *Id.* at 60-61. For the same reasons, the Investigators also found it more likely than not that Roe did not pull her underwear to the side. *Id.*

The Investigators also questioned Roe about Doe's claim that she had said, "go slow…It's been awhile" and "hold it there" after he had penetrated her. *Id.* at 60. Roe had no recollection of saying these things. *Id.* at 61. Roe also told the investigators that Doe did not say that she had said "go slow" or "hold [his penis] inside of her" during their [redacted] conversation. *Id.* at 54. The investigators ultimately did not credit Doe's account of these alleged statements; they also concluded that, even if Roe had said these things, they could not constitute a communication of "clear and voluntary" consent to Doe to penetrate her vagina, before the penetration occurred, when she had clearly instructed him not take off her underwear. *Id.* at 59, 61.

The investigators also questioned Roe about Doe's claim that she agreed to turn on her stomach and switch positions. *Id.* at 60. Roe recalled that shortly after penetrating her vagina, Doe instructed her to "flip over" onto her stomach and she told Doe that she did not like that position, but she did not remember whether she actually flipped over or not, although she remembered her head being turned to the side and she was saying "stop…." *Id.* at 34. The investigators credited Roe's statement that she told Doe to "stop" the penetration when she became aware of what was happening. *Id.* at 61-62. They did not credit Doe's statement that

Roe had complained about her back and that is why it "seemed like a good time to stop." *Id.* at 61-62.

In sum, the investigators' report makes clear that they diligently probed the parties' respective allegations and claimed evidence of consent and non-consent and made reasoned decisions based on the facts as they found them, using the preponderance of evidence standard and making judgments about the relative credibility of the competing accounts. For these reasons, Doe has no likelihood of success on his breach of contract or other claims relating to the adequacy or fairness of BC's process.

II. DOE IS NOT LIKELY TO SUCCEED ON HIS TITLE IX CLAIM.

In *Haidak*, the Court found that statistics which showed that male students were more often accused of and more often expelled for assault was insufficient proof of gender bias because the data failed to address "an array of alternative explanations." *Id.* at *13. "These trends could reflect, for example, that male students on average had lengthier disciplinary histories or committed more serious assaults, or that assaults committed by women were reported less often, rather than that the university discriminated against male students." *Id.*

Similarly in this case, Doe's allegations that sexual assault cases at BC only involve men fails to address the obvious reasons – apart from gender bias – why this could be the case. In fact, the simple reason why only male students have been found responsible of sexual assault is that only male students at BC have been accused of sexual assault, Ex. A ¶ 5 – a fact that is not within BC's control.

The data also undercuts completely Doe's allegations that BC's change from a hearing model to an investigative model was made in order to generate more findings of responsibility

against male students at BC, Compl. ¶ 176. In fact, male students are found ***not*** responsible in a significantly higher percentage of cases under the new procedures. Ex. A at ¶¶ 2, 4.

The Court in *Haidak* also held that it is insufficient for a plaintiff to merely allege bias generally on the part of a university, as Doe has done in this case. *Id.* at 14. The Court held that that the plaintiff's proof of gender bias must include evidence that the specific decision maker(s) in his case were biased. *Id.*

Doe's complaint, however, fails to show any such "causal connection between the outcome of [the] disciplinary proceedings and gender bias." *Id.* (quoting *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 91 (1st Cir. 2018)). As in *Haidak*, Doe fails to make any allegations that the decision-makers in his case were biased. Nor does he make any allegations about the administrators who determined his sanction or the appellate officer who reviewed his case that could plausibly support a claim of gender bias.

For all of these reasons, Doe is unlikely to succeed on the merits of his Title IX "erroneous outcome" claim. [2]

III. DOE'S ALLEGATIONS OF IRREPARABLE HARM ARE INSUFFICIENT.

In the unlikely event that Doe ultimately wins this litigation, with the result that the finding of misconduct and his suspension are expunged, Doe will have suffered no harm that cannot be addressed by compensatory damages.

Doe's expert, [redacted], does ***not*** assert that, in this scenario, Doe will be unable to participate in a [redacted] nor does he cite any facts that would support such a conclusion. He says only that "A lost [redacted] would impact the plaintiff's opportunity

[2] The Court's holdings and rationale, which applied to a "selective enforcement" theory under Title IX, logically apply with equal force to the "erroneous outcome" theory that Doe asserts in this case.

to [redacted]." Aff. at ¶ 7. Other than vaguely pointing to an article he has written, without any explanation, he does not explain what that impact would be nor does he indicate that such an impact would be certain to occur. *Id.* Moreover, it is implausible that someone who has been vindicated in litigation as Doe would have been (unlike the examples Doe's expert has provided) would be forever ostracized by [redacted] – especially if they are such a [redacted] as Doe claims to be.

Doe's reliance on [redacted], is misplaced. Reply at 14. [redacted]

Plaintiff's reliance on [redacted], is also misplaced. Reply at 14. [redacted] Allowing Doe to return to BC notwithstanding the finding of sexual assault on the basis that [redacted] would substantially undermine BC's student conduct system and – understandably – give credence to the arguments of some sexual assault survivors that [redacted]. It also will substantially undermine BC's ability to provide a safe and welcoming educational environment for Roe, who inevitably will

encounter Doe in academic buildings, residence halls, dining facilities and otherwise on campus.[3]

Conclusion

For the foregoing reasons, and those stated in BC's opening memorandum, Doe's request for injunctive relief should be denied.

TRUSTEES OF BOSTON COLLEGE,

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This document was served electronically upon all counsel of record by email on August 15, 2019.

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[3] In [redacted] a case also cited by Doe, the Court ultimately held that while the [redacted] "some irreparable harm" that was seemingly "trivial," a preliminary injunction was not warranted because there was an equally strong interest in avoiding the harm that would be suffered by others and the [redacted] should the plaintiff be permitted [redacted].

EXHIBIT A

UNITED STATES DISTRICT COURT
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DECLARATION OF COREY KELLY, PH.D.

1. I am the Director of Student Conduct for Boston College's Division of Student Affairs, and in that capacity I have personal knowledge of the matters set forth in this declaration.

2. From August 2011 to May 2014, during which time Boston College utilized Administrative Hearing Boards and Administrative Hearings to investigate allegations of sexual assault, 9 male students at Boston College who were accused of sexual assault went through conduct proceedings that reached a final determination. Of those 9 students, 7 were found responsible for sexual assault, 1 was found not responsible, and 1 ended in a "no finding."

3. In the fall of 2014, Boston College changed its disciplinary procedures for sexual assault allegations. Before the change, determinations of responsibility were made by a five-person hearing panel following a live hearing. After the change, determinations of responsibility usually have been made by a single investigator, or a pair of investigators.

4. Since Boston College changed its procedures in 2014, 32 cases involving allegations of sexual assault against male students have reached a final conclusion. Of those students, 18 were found responsible and 14 were found not responsible.

5. Only male students at Boston College have been accused of sexual assault.

6. The figures above were drawn from records that are routinely made and kept by the College in the course of regularly conducted business activity. Those records were made and kept in accordance with the College's usual business practices. Each record was made at or near the time of the event that it records. In each case the record was made by a person with knowledge, or from information transmitted by a person with knowledge and who reported that knowledge in the regular course of business.

I declare under the pains and penalties of perjury that the foregoing statements are true and correct.

Corey Kelly, Ph.D.

Executed on August 15, 2019

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This document was served electronically upon all counsel of record by email on August 15, 2019.

Elizabeth H. Kelly